INDEX

Page

Opinion Below 1

Jurisdiction 2

Statutes Involved 2

Questions Presented 2

Statement of the Case 3

(a) Constitutionality of State Statute 5

(b) Constitutionality of Federal Statute 6

The Federal Questions Presented by This Appeal Are Substantial 7

Appendix

Opinion in the New York Court of Appeals 15

Decision of Supreme Court of the State of New York, County of New York 21

Judgment 31

General Business Law of the State of New York.... 33

Section 5 of Federal Trade Commission Act, as amended, Act of July 14, 1952, 15 U.S.C. § 45 34

TABLE OF AUTHORITIES

Cases:

A. L. A. Schechter Poultry Corp. v. *United States*, 295 U. S. 495 ..... 11, 13

Bourjois Sales Corp. v. *Dorfman*, 273 N. Y. 167, 7 N. E. 2d 30 (1937) 4, 5

Carter v. *Carter Coal Co.*, 298 U. S. 238 ..... 10, 11, 12

Charleston Federal Savings & Loan Ass'n. v. *Alderson*, 324 U. S. 182, 185 2

Dr. Miles Medical Co. v. *John D. Park & Sons Co.*, 220 U. S. 373 ..... 7, 11

Doubleday, Doran & Co., Inc. v. *R. H. Macy & Co.*, 269 N. Y. 272, 199 N. E. 409 (1936) 5

Eubank v. *Richmond*, 226 U. S. 137 10

Nebbia v. *New York*, 291 U. S. 502 10

Old Dearborn Distributing Co. v. *Seagram's-Distillers Corp.*, 299 U. S. 183 ..... 5, 7, 8, 9, 13

Page

Olsen v. *Nebraska*, 313 U. S. 236 9
Panama Refining v. *Ryan*, 293 U. S. 388 12
Schwegmann Bros. v. *Calvert Distillers Corp.*, 341 U. S. 384 .....8, 9, 10, 12
Schwegmann Bros. v. *Eli Lilly & Co.* 205, F. 2d 788, cert. den. 346 U. S. 856 9
Smith v. *Allwright*, 321 U. S. 649 13
State of Washington v. *Roberge*, 278 U. S. 116.....10, 11
Sunshine Anthracite Coal Co. v. *Adkins*, 310 U. S. 381 11
The Pep Boys, Manny, Moe & Jack v. *Pyroil Sales Co.*, 299 U. S. 198 7
United States v. *Line Material Co.*, 333 U. S. 287 11
United States v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 12
Winters v. *New York*, 333 U. S. 507 2
Yakus v. *United States*, 321 U. S. 414 10

STATUTES:

Section 369-b of the New York General Business Law (McKinney's Consol. Laws of N.Y.), L. 1935, ch. 976, reenacted L. 1940, ch. 195 2
Section 5 of the Federal Trade Commission Act as amended, 15 U.S.C. § 45, Act of July 14, 1952, C. 745, 66 Stat. 632 2
Interstate Commerce Act, 49 U.S.C. § 5(b)(9) 12
Shipping Act, 1916, 46 U.S.C. § 814 12

MISCELLANEOUS:

Bowman, "Resale Price Maintenance—A Monopoly Problem", XXV The Journal of Business of the University of Chicago 141 (July, 1952) 13
Bream, "Discount Houses Stir Up A $5 Billion Fuss", 37 Life Magazine 52 (Aug. 9, 1954) 13
"Fair Trade and Horizontal Price Fixing: Their Status Since the Second Schwegmann Case", 63 Yale L. J. 538, 544 (1954) 13
"Fair Trade—Does It Warrant Reexamination?", 48 Northwestern U. L. Rev. 777 (1954) 13
H. R. No. 1437, 82nd Cong., 2nd Sess. (1952) 9
Note, 102 U. of Pa. L. Rev. 409 (1954) 13

BLEED THROUGH POOR COPY

IN THE

Supreme Court of the United States

October Term, 1954

No.

MASTERS, INC., *Appellant*

v.

GENERAL ELECTRIC CO., *Appellee*

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the New York Court of Appeals which affirmed a decision of the New York Supreme Court, New York County, permanently enjoining Appellant, Masters, Inc., from advertising, offering for sale, or selling appliances manufactured by Appellee at prices below the minimum retail resale prices fixed by Appellee in contracts with third-party retailers in the state of New York.

OPINION BELOW

The opinion of the New York Court of Appeals in this and companion cases is reported at 307 N.Y. 229, 120 N.E. 2d 802 (1954). The opinion of the Court of Appeals and

the findings of fact and conclusions of law by the Supreme Court, New York County, are reprinted herewith as Appendix A.

JURISDICTION

Appellee instituted this suit on November 6, 1952 in the Supreme Court of New York County, pursuant to the New York "Fair Trade" Law, General Business Law § 369-a *et seq.* (McKinney's Consol. Laws of N.Y.), to enjoin Appellant from selling appliances manufactured by Appellee at less than the stipulated minimum retail resale price. The judgment of the New York Court of Appeals was entered on June 4, 1954, and Notice of Appeal was filed with the Clerk of the Supreme Court, New York County, on August 31, 1954. The jurisdiction of this Court to review the judgment below is conferred by Title 28, United States Code, Section 1257(2). The jurisdiction of this Court is believed to be sustained by *Winters* v. *New York*, 333 U.S. 507; see *Charleston Federal Savings & Loan Ass'n.* v. *Alderson*, 324 U. S. 182, 185.

STATUTES INVOLVED

This appeal involves the constitutionality of Section 369-b of the New York General Business Law (McKinney's Consol. Laws of N.Y.), L. 1935, ch. 976, reenacted L. 1940, ch. 195, commonly known as the Feld-Crawford Act, and Section 5 of the Federal Trade Commission Act as amended, 15 U.S.C. § 45, Act of July 14, 1952, C. 745, 66 Stat. 632, colloquially known as the McGuire Act. The text of both laws is set out in Appendix B hereto.

QUESTIONS PRESENTED

1. Does the New York "Fair Trade" Law, specifically Section 369-b thereof, as applied to persons who are not parties to fair trade contracts (commonly referred to as "non-signers"), violate the due process clause of the Fourteenth Amendment to the Constitution of the United States?

2. To the extent that its validity depends upon the Act of Congress of July 14, 1952, 66 Stat. 632, 15 U.S.C. § 45, colloquially known as the McGuire Act, is the New York "Fair Trade" Law invalid for the reason that the McGuire Act unconstitutionally delegates to the several states and to private persons the legislative power and the power to regulate commerce among the several states in violation of (a) Article 1, Section 1 vesting "All legislative Powers herein granted" in the Congress; (b) Article 1, Section 8, authorizing Congress to regulate commerce among the several states; and (c) the due process clause of the Fifth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

1) The essential facts were stipulated and are not in dispute. Appellant, a New York corporation, has for many years owned and operated a retail store in New York City at which it sells thousands of items of merchandise, including appliances manufactured by Appellee, to customers in New York and by mail to persons throughout the United States. By reducing overhead costs and by eliminating costly services which countless customers are willing to forego, Appellant has been able profitably to offer merchandise at prices lower than those specified in fair trade agreements entered into by Appellee with other retailers. Appellant's policy has led to steadily increasing patronage; its annual sales at the time of suit exceeded $8,000,000.

Appellee, a New York corporation, manufactures household appliances bearing the trade mark "General (GE) Electric", which it distributes in interstate commerce. It has entered into agreements with various retail dealers in the State of New York establishing minimum retail resale prices for General Electric appliances. Under such contracts, Appellee reserves the right "in its absolute discretion" to alter the stipulated prices and to add or withdraw products subject to the agreement. Appellant

has never executed such an agreement with Appellee and, in conformity with its established practices, Appellant advertised and sold General Electric appliances at prices below those fixed by Appellee in its resale price maintenance contracts.

Appellee thereupon instituted this suit in the New York Supreme Court, New York County, for damages and for an injunction restraining Appellant from selling Appellee's appliances below the "fair trade" prices. Appellee relied upon the "non-signer" clause of the New York "Fair Trade" Act, N.Y. Gen. Bus. Law § 369-b, which provides in substance that knowingly advertising, offering for sale, or selling a commodity for less than the price fixed in a fair trade contract constitutes unfair competition, even though the party so advertising or selling is not a signatory to such an agreement. No claim was advanced that the challenged sales were made by Appellant at a loss or below cost, or that Appellant did not realize a reasonable profit from the sales of General Electric appliances, or that Appellant committed any fraud or deception in the sale of Appellee's appliances. At the time of sale Appellant had absolute title to such appliances, and no claim is here made that Appellant did not lawfully acquire such goods.

On May 8, 1953, the New York Supreme Court granted the permanent injunction as sought by Appellee (App. 30). On appeal, the judgment was affirmed *per curiam* by the Appellate Division of the New York Supreme Court on January 5, 1954 (App. 15). Its judgment was subsequently upheld by the New York Court of Appeals, 307 N.Y., 229, 120 N.E. 2d 802 (1954). (Appendix A.) The Court of Appeals rejected contentions that the New York Fair Trade Act violated the state and federal constitutions. It ruled first that the New York statute did not constitute an unlawful delegation of legislative power to private persons or a deprivation of due process under either the federal or state constitutions. These issues, said the Court, were decided adversely to Appellant in *Bourjois Sales Corp.* v.

BLEED THROUGH POOR COPY

Dorfman, 273 N.Y. 167, 7 N.E. 2d 30 (1937), which was based upon this Court's decision in *Old Dearborn Distributing Co.* v. *Seagram's-Distillers Corp.*, 299 U.S. 183.[1] The Court also concluded, on the basis of the *Old Dearborn* decision, that the New York act did not deprive Appellant of equal protection. It said that the statute does not create an "unreasonable or arbitrary discrimination against low cost, minimum service retailers" (App. 18). The Court further denied contentions that the McGuire Act vests the states with power over interstate commerce in violation of the federal constitution. The Court said that enforcement of fair trade contracts against nonsigners constitutes "compulsion * * * expressly authorized by Congress" through the McGuire Act and does not "transgress any constitutional prohibition" (App. 20).

2) The Federal questions sought to be reviewed were raised by Appellant in the trial court in the Answer. The questions were preserved at each stage of the litigation and were passed upon by the Court of Appeals. The following excerpts from the record are here set out in compliance with Revised Rule 15(d):

(a) Constitutionality of State Statute

As a "Fourth Separate and Complete Defense to the Complaint", Appellant alleged as follows:

"26. The New York Fair Trade Law upon which plaintiff's alleged cause of action, as set forth in the complaint

[1] Shortly after its enactment, the New York "Fair Trade" Act here challenged was ruled unconstitutional by the New York Court of Appeals. *Doubleday, Doran & Co. Inc.* v. *R. H. Macy & Co.*, 269 N.Y. 272, 199 N.E. 409 (1936). The Court concluded that under decisions of this Court the statute set prices arbitrarily and invalidly delegated price fixing authority to private persons. The *Old Dearborn* opinion was rendered shortly thereafter by this Court. The Court of Appeals thereupon overruled the *Doubleday, Doran* decision and held the New York act valid. *Bourjois Sales Corp.* v. *Dorfman, supra.*

herein, is solely based, is unconstitutional and void in that it:

(a) Deprives defendant of liberty and property without due process of law in violation of Section 6 of Article I of the Constitution of the State of New York and of the Fourteenth Amendment of the Constitution of the United States."

With reference to the foregoing, the Court of Appeals stated:

"Defendants' principal attack is directed toward the constitutionality of the Feld-Crawford Act. They argue that the statute constitutes an unlawful delegation of legislative powers to private persons in violation of Section I of Article III of the New York State Constitution, a deprivation of property without due process of law and a denial of equal protection of the laws in violation of both the New York State and Federal Constitutions, particularly the former" (App. 17-18).

(b) Constitutionality of Federal Statute

As a "Sixth Separate and Complete Defense to the Complaint", Appellant alleged as follows:

"42. To the extent that the Act of Congress of August 7, 1937 (Chapter 690, Title 8), or the Act of Congress of July 14, 1952 (Chapter 745) purports to sanction the GE resale price maintenance system and the "Fair Trade Agreements" entered into thereunder and to adopt for interstate commerce the provisions of the New York Fair Trade Law, upon which this action is predicated, such laws are unconstitutional and void in that they:

(a) Deprive defendant of liberty and property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

* * *

(c) Are an unconstitutional delegation of legislative power to various states of the United States in violation of Sections 1 and 8 of Article I of the Constitution of the United States, and of Article VI of the Constitution of the United States.

(d) Are an unconstitutional delegation of legislative power to private persons in violation of Section 8 of Article I of the Constitution of the United States."

THE FEDERAL QUESTIONS PRESENTED BY THIS APPEAL ARE SUBSTANTIAL

I

The question presented by this appeal is whether the oft-challenged doctrines of *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.*, 299 U.S. 183, shall be permitted to stand. The "non-signer" provision of the New York resale price maintenance statute here challenged is precisely the same as the Illinois act upheld in *Old Dearborn*.[2] Knowingly advertising, offering for sale, or selling a commodity covered by a resale price maintenance contract at less than the fair trade price is made actionable, even though the defendant-seller is not a party to any such agreement.

The central thesis of this appeal is that the New York "Fair Trade" law, and the McGuire Act, 15 U.S.C. § 45, from which the state law derives ostensible validity, unlawfully delegate to private persons the power to fix prices.[3] In *Old Dearborn*, this Court concluded that such

---

[2] The identical California "non-signer" statute was simultaneously sustained by the Court in a companion case, *The Pep Boys, Manny, Moe & Jack* v. *Pyroil Sales Co.*, 299 U. S. 198.

[3] The *Old Dearborn* ruling was confined to intra-state commerce; resale price maintenance in interstate commerce had been declared invalid under the Sherman Act in *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373. Appellant submits (1) that the New York "Fair Trade" Act is invalid as applied both to intra-state and interstate commerce, for the reason that it delegates legis-

a provision did not constitute an "unlawful delegation of power to private persons to control the disposition of the property of others" in derogation of the due process clause of the Fourteenth Amendment (299 U.S. at 194). The Court proceeded from the premise that the non-signing seller

> "acquired the commodity in question with full knowledge of the then existing restriction in respect of price which the producer and wholesale dealer had imposed, and, of course, with presumptive if not actual knowledge of the law which authorized the restriction. Appellants were not obliged to buy; and their voluntary acquisition of the property with such knowledge carried with it, upon every principl of fair dealing, assent to the protective restriction, with consequent liability under section 2 of the law [the 'non-signer' provision] by which such acquisition was conditioned" (299 U.S. at 193-194).

The question-begging character of this doctrine of implied "assent" was perceived by this Court in 1951 in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384. A Louisiana "non-signer" provision, identical in terms with the Illinois act in *Old Dearborn* and the New York statute here, was condemned by the Court as "coercive" and as a statutory "club" which "forced" recalcitrant retailers "to submit to price fixing".[4] The

---

lative power to private persons in violation of the due process clause of the Fourteenth Amendment and (2) that the McGuire Act, 15 U.S.C. § 45, delegates power to private persons over interstate commerce in violation of Article I, Section 1, vesting all legislative power in Congress, the commerce clause, and the due process clause of the Fifth Amendment. The Court below found that "All of the transactions in issue involve interstate commerce either directly or indirectly" (App. 17).

[4] This straightforward characterization of fair trade agreements as "price fixing" is in marked contrast with *Old Dearborn* where the Court rejected the contention that private agreements pursuant to fair trade laws constituted price fixing within the meaning of decisions construing the Fourteenth Amendment (299 U. S. at 192).

POOR COPY

Court concluded that the Miller-Tydings Act, 15 U.S.C. § 1, did not authorize the states to "impose price fixing on persons who have not contracted or agreed to the scheme", and it characterized such legislation as "price fixing by compulsion" and a "resort to coercion" (341 U. S. at 388).[5] The *Schwegmann Bros.* decision accordingly did not require resolution of any constitutional question respecting the power of Congress to authorize the states to permit enforcement of fair trade agreements against non-signers, though it has precipitated confusion and cast doubt on the continued vitality of the *Old Dearborn* ruling. The constitutional issue is squarely raised in this case as a result of the McGuire Act, 15 U.S.C. § 45, which Congress adopted in 1952 after this Court's decision in *Schwegmann Bros.* v. *Calvert Distillers Corp.* See H. R. No. 1437, 82nd Cong., 2nd Sess., pp. 1-2 (1952).

II

Appellant submits that the "non-signer" provision of the New York "Fair Trade" Act delegates to private persons the power to fix prices in violation of the due process clause of the Fourteenth Amendment. The authority of state governments to fix prices has been upheld by this Court, but only when undertaken for a public purpose and by reasonable methods. *Olsen* v. *Nebraska*, 313 U. S. 236; *Nebbia* v. *New York*, 291 U. S. 502. Congressional power to fix prices in time of emergency was sustained where "[t]he boundaries of the field of the Administrator's permissible action [were] marked by the statute." *Yakus* v. *United States*, 321 U. S. 414, 423. Even if it be assumed that the state government may fix the retail resale price of branded merchandise, it does not follow that such power may be entrusted to private persons for their own commer-

[5] "[I]t would be a fabrication to assume that the Schwegmanns [non-signers] have consented to the prices fixed by appellee." *Schwegmann Bros.* v. *Eli Lilly & Co.*, 205 F. 2d 788, 795 (5th Cir. 1953), cert. den. 346 U. S. 856 (Holmes, J. dissenting).

cial interests and without any procedural safeguards. The New York "Fair Trade" Act delegates the authority to fix prices to interested persons without prescribed standards[6] and without any provision for hearing or review. The General Electric resale price maintenance contracts which Appellant has been enjoined to follow provide that

> "General Electric may, from time to time, *in its absolute discretion*, withdraw any or all of said products from its list of fair trade prices, may add products thereto for which minimum retail prices are stipulated and may change or revise the minimum retail prices for the said products listed therein" (emphasis supplied).

Appellant is thus forced to price merchandise to which it has absolute title and to conduct its business subject to the "absolute discretion" of Appellee, who may compel compliance in courts of equity and by suits for money damages. Precisely this power was branded by this Court in *Schwegmann Bros.* as "coercive" and a "club", p. 9, *supra*. "The delegation of power so attempted, is repugnant to the due process clause of the Fourteenth Amendment." *State of Washington* v. *Roberge*, 278 U. S. 116, 122; *Eubank* v. *Richmond*, 226 U. S. 137.

Comparable delegation was condemned by this Court in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, as an "intolerable and unconstitutional interference with personal liberty and private property." In the words of the Court:

> "This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are ad-

[6] Compare the Emergency Price Control Act which required that the prices established by the Administrator be "fair and equitable, and in fixing them the Administrator is directed to give due consideration, so far as practicable, to prevailing prices during the designated base period . . ." *Yakus* v. *United States*, 321 U. S. 414, 423; see also *State of Washington* v. *Roberge*, 278 U. S. 116.

BOOR COPY

verse to the interests of others in the same business" (298 U. S. at 311).[7]

Indeed, the "fair trade" acts grant power in excess of the authority to establish codes of "fair competition" under the National Industrial Recovery Act, struck down by this Court in *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495. Under that Act, representatives of labor and consumers, as well as the company affected, were permitted to participate in the price fixing.

The far reaching implications to consumers of unsupervised price fixing are manifest. Price fixing in any form "is one of the most effective devices to regiment whole industries and exact a monopoly price from the public. • • • The prices charged by the regimented industry are determined not by representatives of the public, as in the case of electric, water, and gas rates, but by private parties who incline to charge all the traffic will bear." *United States* v. *Line Material Co.* 333 U. S. 287, 320 (Douglas, Black, Rutledge, Murphy, J.J., concurring.)[8]

III

If the McGuire Act is for any reason invalid, the New York "Fair Trade" statute, which is predicated upon the

---

[7] In *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, this Court sustained the constitutionality of the Bituminous Coal Act of 1937, passed as a result of *Carter* v. *Carter Coal Co.* The Court emphasized that Congress had transferred price fixing power from the industry to the National Bituminous Coal Commission, a federal regulatory agency. "Since law-making is not entrusted to the industry, this statutory scheme is unquestionably valid" (310 U. S. at 339). Compare the conspicuously different legislative reaction to the *Schwegmann Bros.* decision.

[8] In *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373, the Court recognized that as a result of resale price maintenance agreements "all room for competition between retailers, who supply the public, is made impossible. If these contracts leave any room at any point of the line for usual play of competition between the dealers in the product marketed by the complainant, it is not discoverable" (220 U. S. at 400).

federal act, is also void as applied to interstate commerce. The McGuire Act, in the words of the Court below, "exempts from the Federal antitrust laws fair trade agreements made pursuant to existing or future State laws, and permits their enforcement against non-signers as well as signers who are engaged in interstate commerce" (App. 19). Congress was of course aware that the state governments had not established administrative machinery for fixing retail resale prices of trademarked goods, and that such authority was sub-delegated to private persons. The states are thus mere conduits for the transmission by Congress to private persons of the power to fix prices.

The "typical method adopted by Congress when it has lifted the ban of the Sherman Act is the scrutiny and approval of designated public representatives." *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 227. Thus, rate fixing agreements by rail or water carriers are exempt from the antitrust laws only after prior approval by the Interstate Commerce Commission or the Federal Maritime Board. 49 U.S.C. § 5(b)(9); 46 U.S.C. § 814. No provision, however, is made by the McGuire Act for the prior "approval of designated public representatives". In conveying the power to obtain a statutory immunity to private persons without circumscribed standards, Congress has not only departed from established precedent, but it has raised novel and important constitutional questions respecting limitations on the delegation of legislative power under Article I, Section 1, the commerce clause, and the Fifth Amendment to the Constitution. *Carter* v. *Carter Coal Co., supra; Schechter Poultry Corp.* v. *United States, supra;* cf. *Panama Refining* v. *Ryan*, 293 U. S. 388.

IV

The decision in *Schwegmann Bros.* v. *Calvert Distillers Corp.* has opened the door to a reconsideration of the con-

POOR COPY

stitutionality of the "non-signer" provisions.[9] The confusion created by repudiation of the *Old Dearborn* rationale should not be perpetuated. *Stare decisis* has never been deemed dispositive by this Court in cases presenting constitutional questions. As Mr. Justice Reed stated for the Court in *Smith* v. *Allwright*, 321 U. S. 649, 655; "[W]hen convinced of former error, this Court has never felt constrained to follow precedent. . . . [T]his Court throughout its history has freely exercised the power to reexamine the basis of its constitutional decisions." The *Old Dearborn* opinion was rendered while the fair trade movement was still in its incipient stages. In 1936 only fourteen states had adopted fair trade acts[10] and the economic implications of widespread resale price maintenance were not then clear. Today, fair trade laws have been adopted in more than forty states. In 1954, the merchandise sold by anti-fair trade concerns will total nearly 5 billion dollars in value.[11] The questions presented profoundly affect virtually all of the nation's retailers and the welfare of the consuming public. They should be authoritatively settled by this Court.

Appellant respectfully submits that the federal ques-

---

[9] See Comments, "Fair Trade—Does It Warrant Reexamination?", 48 Northwestern U. L. Rev. 777 (1954); "Fair Trade and Horizontal Price Fixing: Their Status Since the Second Schwegmann Case", 63 Yale L.J. 538 544 (,1954); Note, 102 U. of Pa. L. Rev. 409 (1954).

[10] Bowman, "Resale Price Maintenance—A Monopoly Problem," XXV The Journal of Business of the University of Chicago 141 (July, 1952).

[11] Bream, "Discount Houses Stir Up A $5 Billion Fuss," 37 Life Magazine 52 (Aug. 9, 1954).

tions presented by this appeal are substantial and that probable jurisdiction should be noted.

Respectfully submitted,

JOSEPH F. RUGGIERI
16 Court Street
Brooklyn, New York

THURMAN ARNOLD
1229 19th Street, N.W.
Washington, D. C.
Attorneys for Appellant

Of Counsel:

NORMAN DIAMOND
ABE KRASH
ARNOLD, FORTAS & PORTER
1229 19th Street, N. W.
Washington, D. C.

October 1, 1954.

APPENDIX A

THE OPINIONS BELOW

Opinion by the New York Court of Appeals

GENERAL ELECTRIC COMPANY, *Respondent*,

v.

MASTERS, INC., *Appellant*.

LIONEL CORPORATION, *Respondent*,

v.

S. KLEIN ON THE SQUARE, INC., *Appellant*.

RAXOR CORPORATION et al., *Respondents*,

v.

SAM GOODY, *Appellant*.

Argued April 19, 1954; decided June 4, 1954.

* * * * * * * * * * *

APPEAL, in the first above-entitled action, on constitutional grounds, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 5, 1954, unanimously affirming a judgment of the Supreme Court in favor of plaintiff, entered in New York County upon a decision of the court at Special Term (O'BRIEN, *J.*).

APPEAL, in the second above-entitled action, on constitutional grounds, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered October 26, 1953, unanimously affirming a judgment of the Supreme Court in favor of plaintiff, entered in New York County upon a decision of the court at Special Term (BENVENGA, *J.*).

APPEAL, in the third above-entitled action, on constitutional grounds, from a judgment in favor of plaintiff, entered December 31, 1953, upon a resettled order of the Appellate Division of the Supreme Court in the first judicial department, which modified, and, as modified, affirmed a judgment of the Supreme Court in favor of plaintiffs, entered in New York County upon a decision of the court on a trial at Special Term (ISIDOR WASSERVOGEL, Special Ref.). The modification consisted of deleting phonograph records bearing the trade-mark "Soria Series" from the injunctive provisions of the judgment.

* * * * *

FROESSEL, *J.* We are again confronted with an attack upon the so-called Feld-Crawford "Fair Trade Law" (General Business Law, § 369-a *et seq.*, L. 1935, ch. 976, reenacted L. 1940, ch. 195). This statute first came before us for review in *Doubleday, Doran & Co.* v. *Macy & Co.* (269 N. Y. 272), decided January 7, 1936, wherein plaintiff Doubleday sought to enjoin Macy, a nonsigner of its fair trade agreements, from selling three of plaintiff's books at less than their stipulated fair trade prices. We held that the "non-signer" provision was unconstitutional, because by its means the Legislature was indirectly fixing prices, a result which it could not, absent special circumstances, accomplish directly.

Exactly eleven months later, the Supreme Court of the United States reviewed a similar statute enacted in Illinois, the validity of which was attacked "upon the grounds that it denies due process of law and the equal protection of the laws in violation of the Fourteenth Amendment." Rejecting these contentions, the Supreme Court held that the statute was not "so arbitrary, unfair or wanting in reason as to result in a denial of due proc-

ess", that it did not constitute an unlawful delegation of legislative power, and that it satisfied the test of equal protection of the laws guaranteed by the Fourteenth Amendment (*Old Dearborn Co.* v. *Seagram Corp.*, 299 U. S. 183).

Almost immediately thereafter, the New York statute was again before us in *Bourjois Sales Corp.* v. *Dorfman* (273 N. Y. 167). This time, relying on the *Old Dearborn* decision, we upheld the statute against claims that it violated the *New York State Constitution*. Indeed, Chief Judge CRANE, who wrote for the court in *Doubleday* as well as the *Bourjois* case, said in the latter (p. 172): "Had the *Seagram* [*Old Dearborn*] case been decided before argument in the *Doubleday* case we certainly would have followed the Supreme Court's ruling on the Federal Constitution. We do so now". The statute has since been considered and applied by us in at least four cases (*Port Chester Wine & Liquor Shop* v. *Miller Bros. Fruiterers*, 281 N. Y. 101 [retailer's right of action]; *Guerlain, Inc.* v. *Woolworth Co.*, 297 N. Y. 11, certiorari denied 332 U. S. 837 [rebottling of perfumes]; *Calamia* v. *Goldsmith Bros.*, 299 N. Y. 636, remittitur amended 299 N. Y. 795 [cigars in interstate commerce]; and *Bristol-Myers Co.* v. *Picker*, 302 N. Y. 61 [trading stamps as price cutting]), in all of which validity of the law under the New York State Constitution was urged upon us by the parties, but rejected.

In each of the three cases now before us, the defendant, a nonsigner of the plaintiff's fair trade agreements, has been enjoined from selling plaintiff's fair traded products at less than their stipulated minimum prices. All of the transactions in issue involve interstate commerce either directly or indirectly, and, since in large measure the issues presented by the three cases are identical, they shall be discussed together, insofar as possible.

Defendants' principal attack is directed toward the constitutionality of the Feld-Crawford Act. They argue that the statute constitutes an unlawful delegation of legislative powers to private persons in violation of section 1 of article III of the New York State Constitution, a deprivation of property without due process of law and a denial

of equal protection of the laws in violation of both the New York State and Federal Constitutions, particularly the former.

Seventeen years ago we disposed of the delegation of power and due process arguments in the *Bourjois* case (*supra*). Even though our opinion did not separately and specifically discuss those issues as arising under the State Constitution, they were actually presented and argued to our court, were necessarily disposed of by our decision there, and are therefore no longer open to question.

Defendants' economic and policy arguments concerning the doubtful wisdom of fair trade laws have been urged before the courts over and over again. They were reviewed in the *Old Dearborn* case (*supra*, pp. 195-196), and, as was there said, "Where the question of what the facts establish is a fairly debatable one, we accept and carry into effect the opinion of the legislature"; its determination "is conclusive so far as this court is concerned" (p. 196). Such contentions are properly addressed to the Legislature; they do not alone provide sufficient reason for us to reopen settled constitutional issues.

Nor is there merit to defendants' contention that the statute denies equal protection of the laws. In the *Old Dearborn* case (*supra*) the equal protection argument which was there raised against the Illinois fair trade statute was summarily rejected by the Supreme Court in its holding (p. 197): "Clearly, the challenged section of the Illinois act *satisfies this test*" (emphasis supplied). In the present case, moreover, the statute creates no unreasonable or arbitrary discrimination against low cost, minimum service retailers, as defendants contend. The statute itself does not purport to create any such distinction or classification. Its provisions are wholly inapplicable to unmarked goods. As to marked goods, it merely permits a manufacturer, whose trade-mark or brand name may represent a large advertising investment and a carefully nurtured good will, to prevent retailers, over whom he would otherwise have little control, from seriously impairing the value of that trade-mark and good will by reselling his identified products at unreasonably low prices. Finally,

we have already held that this statute constitutes a reasonable regulation under the police power (*Bourjois* case, *supra*).

Defendants now present a new constitutional challenge by attacking the Maguire Act (66 U. S. Stat. 632, U. S. Code, tit. 15, § 45), which was enacted following the recent decision in *Schwegmann Bros.* v. *Calvert Corp.* (341 U. S. 384). That act exempts from the Federal antitrust laws fair trade agreements made pursuant to existing or future State laws, and permits their enforcement against nonsigners as well as signers who are engaged in interstate commerce. Defendants argue that this enactment gives to the States power over interstate commerce which is denied them under the Federal Constitution.

Beginning with the familiar distinction between commerce which, while primarily local, indirectly affects interstate commerce, and that which is directly of national concern, defendants claim that the latter type of commerce is, by virtue of the Constitution, *exclusively* within the power of Congress, and cannot under any circumstances be regulated by the States. However, this basic distinction is drawn merely to determine the extent of State power in those areas where Congress by its silence has permitted its own power to remain dormant. The distinction does not, as defendants contend, restrict the power of a State acting, as here, under an express grant by Congress (*Prudential Ins. Co.* v. *Benjamin* 328 U. S. 408, 421-423). As the Supreme Court said in *Southern Pacific Ry. Co.* v. *Arizona* (325 U. S. 761, 769): "Congress has undoubted power to redefine the distribution of power over interstate commerce. It may * * * permit the states to regulate the commerce in a manner which would otherwise not be permissible [citations]".

It is true that in *Schwegmann Bros.* v. *Calvert Corp.* (*supra*) the Supreme Court held that by the Miller-Tydings amendment (50 U. S. Stat. 693, U. S. Code, tit. 15, § 1), which exempted from the Sherman Antitrust Act only "contracts or agreements". Congress did not demonstrate an intent to permit fair trade "compulsion" against nonsigners of those agreements. However, the court did not

in its opinion indicate that such "compulsion", if expressly authorized by Congress, would transgress any constitutional prohibition; indeed, the decision contains clear implications to the contrary. The Maguire Act now authorizes such "compulsion", and its constitutionality has been upheld by the United States Court of Appeals for the Fifth Circuit in *Schwegmann Bros. Giant Super Markets* v. *Eli Lilly & Co.* (205 F. 2d 788) a decision which the Supreme Court twice refused to review (certiorari denied 346 U. S. 856, rehearing denied 346 U. S. 905).

Nor should we for this purpose distinguish between transactions affecting interstate commerce, as in the *General Electric* and *Lionel* cases herein, and those directly in interstate commerce, such as the mail-order sales of the *Raxor* case. Just as in the Feld-Crawford Act, where no distinction is drawn between interstate and local commerce, so the language of the Maguire Act makes no discrimination between sales of goods affecting, and sales directly in, interstate commerce. On the contrary, the purpose of that Federal statute, as expressed by Congress in its preamble thereto, was to permit State fair trade laws to apply to commodities, contracts and activities "in or affecting" interstate commerce. Furthermore, the case of *Sunbeam Corp.* v. *Wentling* (185 F. 2d 903, revd. 341 U. S. 944, mod. 192 F. 2d 7), on which defendants rely so heavily in this connection, was decided prior to the Maguire Act's enactment. That the statute was designed to alter the *Wentling* rule so as to open all interstate commerce to the operation of State fair trade acts, appears from the statutory language as aforesaid, from its legislative history and from judicial decision (*Sunbeam Corp.* v. *MacMillan*, 110 F. Supp. 836).

Defendants further contend that the Feld-Crawford Act was never originally intended by our Legislature to apply to resale price maintenance as against nonsignatories engaged in interstate commerce, and that without re-enactment after passage of the Maguire Act it cannot be so applied. But the case of *People* v. *Bootman* (180 N. Y. 1), on which defendants rest this argument, is inapplicable here. True, we there held that without re-enactment after

passage of the Congressional enabling statute, our State Fish and Game Law was not applicable to interstate game. But there, we had previously held that the statute in question was intended to apply only to *local* game (*People* v. *Buffalo Fish Co.*, 164 N. Y. 93).

In the instant cases, however, instead of having, by prior decision, limited the Feld-Crawford Act to local commerce, we have squarely held that the statute applies to non-signatories in *interstate* commerce (*Calamia* v. *Goldsmith Bros., supra*). Although such application was later declared unconstitutional in *Schwegmann Bros.* v. *Calvert Corp.* (*supra*), passage of the Maguire Act in 1952 removed the final barrier to complete interstate application of the New York statute. Under such circumstances it has long been well established that the Constitution does not require a State statute to be re-enacted in order to be effective (*Matter of Rahrer*, 140 U. S. 545; *Central Pacific R. R. Co.* v. *Nevada*, 162 U. S. 512; *Tua* v. *Carriere*, 117 U. S. 201; 1 Southerland on Statutory Construction [3d ed.], § 2027).

Each of the defendants contends that its plaintiff's fair trade contracts do not comply with the provisions of section 369-a of the General Business Law. We have examined these contracts separately, and find on the records before us that in each case there were in existence fair trade contracts which did comply with that part of the statute which sanctions such contracts between "vendor" and "buyer".

Numerous other contentions have been raised by one or more of the defendants. We have carefully considered each of them and find them to be without merit.

The judgment in each case should be affirmed, with costs.

Lewis, *Ch. J.*, Conway, Desmond, Dye and Fuld, *JJ.*, concur; Van Voorhis, *J.*, taking no part.

In each action: Judgment affirmed.

Decision of Supreme Court of the State of New York, County of New York.

This action having been instituted by plaintiff against defendant for an injunction and for damages, and the cause having duly come on before me for trial at Special Term,

Part III of this Court, at the New York County Court House, Borough of Manhattan, City, County and State of New York, on May 7, 1953; and the parties having appeared by their respective counsel and having entered into a written Stipulation of Facts, and due deliberation having been had thereon;

Now, I do hereby make the following findings of essential facts which have been stipulated to by the parties:

FINDINGS OF FACT

1. Both plaintiff and defendant are domestic corporations duly organized and existing under the laws of the State of New York.

2. Plaintiff produces, among other things, electrical housewares, clocks, automatic blankets, fans, heating pads, heaters and heat lamps (hereinafter sometimes referred to as "GE Small Appliances"). GE Small Appliances are manufactured by the Small Appliance Division of plaintiff in factories located in the States of Connecticut, California, Massachusetts, Pennsylvania, New York and North Carolina, and sold and shipped by said Division to wholesale distributors located in the State of New York and all other states throughout the United States. Sales by plaintiff of GE Small Appliances during the year 1952 amounted to substantially in excess of $1,000,000.

3. GE Small Appliances are sold by the plaintiff through wholesale distributors located throughout the country who are franchised by the plaintiff. The franchise agreements entered into by the plaintiff with said wholesale distributors and jobbers are in the form annexed hereto as Exhibit A. The franchised wholesale distributors purchase GE appliances from the plaintiff, acquiring absolute title thereto. They are under no agreement to sell to retailers at minimum or other resale prices established by the plaintiff.

4. GE Small Appliances are in turn sold by said wholesale distributors, to, among others, retail dealers located in the State of New York and elsewhere throughout the

United States, and said appliances are ultimately resold by such retail dealers to the general public.

5. GE Small Appliances bear the plaintiff's trade-mark "General (GE) Electric" and are in free and open competition in the State of New York with appliances of the same general class produced by others.

6. Plaintiff has expended large sums of money in promoting and advertising GE Small Appliances and in such advertising, utilizes, among other media, nationwide periodicals, magazines, publications and national radio and television broadcasts. Plaintiff has established a reputation and goodwill for said appliances and for the trademark under which they are produced and sold.

7. Since in or about 1937, defendant has owned, managed, and operated a single retail store now located at 66 West 48th Street, New York City, wherein it has sold at retail a great diversity of merchandise, including GE Small Appliances. Defendant actively competes for public patronage with numerous other retail stores, including large department stores, small retail stores, general stores, electrical appliances stores, hardware stores and other retail establishments.

8. The overhead and cost of doing business varies among different retail stores and different types of retail stores, depending upon such factors as cash or credit policies, nature or extent of services rendered, the volume of purchases, the extent of advertising and promotional activities, and others. Since its inception defendant has adopted and followed as its principal business policy the minimization of cost of doing business and overhead, by selling only for cash, curtailment of various customer services, reduction of advertising and promotional activities, volume purchases and through other means, with a view toward being able to profitably sell its goods to the consuming public at prices less than stores rendering credit and other services and which otherwise do not or cannot follow the policies of the defendant.

9. Defendant makes sales at retail in New York to customers residing in the State of New York and other states, including the States of Connecticut and New Jersey, and approximately $200,000 of its annual sales are made in New York to customers residing in states other than New York. In addition, advertisements, bulletins and circulars are distributed to customers outside the State of New York.

10. During the course of the operations of defendant, as aforesaid, defendant has from time to time purchased for resale to the general public GE Small Appliances from various wholesale dealers, distributors and others located within and outside the State of New York. Defendant has acquired title to the appliances so purchased. At no time has defendant purchased GE Small Appliances directly from the plaintiff. Defendant has resold such GE Small Appliances at prices below those charged by other competing retail establishments who do not follow the business policies and practices of defendant.

11. Defendant has built up a reputation in the minds of the purchasing public as a retail establishment wherein a consumer, by foregoing certain services and conveniences afforded by other competing retail stores, can obtain merchandise at prices less than those charged by other stores and defendant's goodwill and business is in large measure dependent on such reputation. From a very small beginning defendant's sales volume has grown to in excess of eight million dollars a year.

12. Since July 14, 1952, and from time to time thereafter, the plaintiff has entered into agreements with retail dealers in the State of New York under which plaintiff established minimum retail resale prices for GE Small Appliances (hereinafter sometimes referred to as "GE Fair Trade Contracts"). A copy of the standard form of such agreement is annexed hereto as Exhibit B. Plaintiff is now party to approximately 1,000 agreements in the form of Exhibit B with retailers in the State of New York. There are in excess of 3,500 retail dealers handling GE Small Appliances within the State of New York. In addition, plaintiff

has agreements with one wholesale distributor, General Electric Supply Company, and several retail dealers in the State of New York, in the form annexed hereto as Exhibit C.

13. Plaintiff presently has agreements in the form of Exhibit B hereto with retail dealers in all states of the United States in addition to New York, except the States of Missouri, Florida, Texas, Michigan, Vermont, Georgia and the District of Columbia.

14. Defendant has never entered into any GE "Fair Trade Contract" with plaintiff nor has it entered into any other resale price maintenance agreement relating to GE Small Appliances with any other person, firm or corporation. However, on or about September 9, 1952, and at various other times before and after that date, plaintiff duly notified the defendant of the existence of its said "Fair Trade Contracts" (both in the form of Exhibits B and C annexed hereto) with other retail dealers in the State of New York and of the minimum retail resale prices established by plaintiff for GE Small Appliances under said agreements. Copies of the schedules of minimum retail resale prices established by plaintiff pursuant to said Fair Trade agreements in effect on October 1, 1952, and thereafter, of which defendant was given notice on or about the effective dates appearing on said schedules are attached hereto as Exhibit D.

15. By notation contained on the schedules of minimum retail resale prices, Exhibit D hereto, there are exempted from the operation of the GE Fair Trade Contracts sales made to employees of the plaintiff, sales made by wholesale distributors and retail dealers to their own employees, and sales to governmental agencies, commercial and institional establishments buying for their own use and not for resale.

16. Since October 1, 1952 defendant has wilfully and knowingly advertised, offered for sale and sold at retail one or more of GE Small Appliances at prices lower than those established by plaintiff, as shown on the schedules of minimum retail resale prices annexed as Exhibit D.

17. Said sales by defendant were not for the purpose of closing out defendant's stock of GE Small Appliances, or because said GE Small Appliances were damaged or deteriorated in quality, and such sales were not made by an officer acting under the orders of any court.

18. Retailers competing with defendant have threatened to discontinue handling GE Small Appliances and other retailers have refused to feature and advertise GE Small Appliances because of violations of plaintiff's fair trade contracts by defendant and others.

19. Plaintiff has no adequate remedy at law.

20. General Electric Supply Company (hereinafter sometimes referred to as "GESCO") is a division of General Electric Distributing Corporation, a wholly owned subsidiary of plaintiff, and is engaged, inter alia, in the distributing and sale of GE Small Appliances and of similar appliances manufactured by other manufacturers in interstate commerce through operating branches located throughout the United States, including one which is located at 585 Hudson Street in the City of New York. An internal audit which does not disclose the names of purchasers from GESCO or prices paid for merchandise is made of the General Electric Distributing Corporation by the plaintiff's headquarters office once each year and is paid for by GESCO. The results of said audits are not made available to the personnel of the Small Appliance Division of plaintiff. Annexed as Exhibits E and F is a tabulation of officers and directors of plaintiff and the officers and directors of General Electric Distributing Corporation. Said Exhibits E and F set forth respectively the officers and directors of plaintiff and the officers and directors of General Electric Distributing Corporation. The physical location of the headquarters of GESCO is in a building owned by the plaintiff; the space occupied by the headquarters of GESCO is leased by it from the plaintiff and GESCO pays rent for the space. Ralph J. Cordiner, the President of the plaintiff, selects the directors of General Electric Distributing Corporation and causes the stock of General Electric Distributing Corporation owned by the

POOR COPY

plaintiff to be voted in accordance with his directions and has done so since 1950 when he became President of plaintiff. Such percentage of the earnings of General Electric Distributing Corporation, after taxes, as is distributed, is distributed in the form of dividends on General Electric Distributing Corporation's stock held by plaintiff. The employees of both plaintiff and General Electric Distributing Corporation participate in the same retirement benefit trust which covers the employees of plaintiff and its subsidiaries. Charles R. Pritchard is Vice President of General Electric Distributing Corporation and the operating head of the GESCO division of said corporation and he reports to Ralph J. Cordiner in his capacity as President of General Electric Distributing Corporation. The books, records and accounts of plaintiff and General Electric Distributing Corporation are kept entirely separate and apart by their respective employees. Each operating branch of GESCO is franchised by a separate agreement with plaintiff's Small Appliance Division in the same form as Exhibit A hereto which is the same form under which all distributors are franchised by plaintiff's Small Appliance Division, and said franchise agreements are the only contractual relations between GESCO and plaintiff's Small Appliance Division.

21. Plaintiff does not have outstanding resale price maintenance agreements with respect to its major appliances, television and radio, which are manufactured and sold by separate and distinct operating divisions of plaintiff other than the Small Appliance Division. Said appliances bear plaintiff's trade-mark (General (GE) Electric). The annual dollar volume of sales of said major appliances, television and radio, exceeds the annual dollar volume of sales of GE Small Appliances.

22. During the period from September 1, 1952 to December 31, 1952, inclusive, the prices paid by plaintiff's wholesale distributors in New York, including GESCO, to the plaintiff for GE Small Appliances were less than the prices charged by plaintiff's wholesale distributors in New York, including, GESCO, for GE Small Appliances on their sales to retail dealers, including the defendant.

23. During the period from September 1, 1952 to December 31, 1952, inclusive, plaintiff's wholesale distributors in New York, including GESCO, sold GE Small Appliances to employees of plaintiff and to their own employees, and to governmental agencies and commercial or institutional establishments buying for their own use and not for resale at prices below the minimum retail prices set forth on Exhibit D hereto in accordance with the exemptions contained thereon.

CONCLUSIONS OF LAW

1. Plaintiff is engaged in the production and distribution in interstate commerce of various electrical appliances, including electrical housewares, clocks, automatic blankets, fans, heating pads, heaters, and heat lamps (hereinafter sometimes referred to as "GE small appliances").

2. Pursuant to the terms of the Feld-Crawford Act of New York (Laws of 1935, ch. 976; Sec. 376-a et seq. of the General Business Law of the State of New York) plaintiff, commencing on or about July 14, 1952, has duly entered into contracts (hereinafter referred to as "GE Fair Trade Contracts"), now in full force and effect, with retail dealers in the State of New York, under which agreements there was and is vested in the plaintiff the right to establish, from time to time, the minimum retail resale prices of GE small appliances.

3. The aforesaid GE Fair Trade Contracts comply in all respects with the requirements of the Feld-Crawford Act.

4. Although the defendant is not a party to any GE Fair Trade Contract the defendant, since on or about September 9, 1952, has been and is bound by the terms of the aforesaid Feld-Crawford Act and by the GE Fair Trade Contracts entered into by the plaintiff with various retailers in the State of New York pursuant thereto, not to sell at retail GE small appliances at prices lower than those heretofore and hereafter prescribed by plaintiff pursuant to said contracts.

POOR COPY

5. That since October 1, 1952, defendant has wilfully and knowingly advertised, offered for sale and sold various quantities of GE small appliances at prices lower than those established by plaintiff pursuant to the aforesaid contracts.

6. That by so doing defendant has engaged in unfair competition as defined by Section 369-b of the Feld-Crawford Act, and the plaintiff is a person "damaged" by such acts within the meaning of said section.

7. That plaintiff has established all the facts required to be shown in order to entitle plaintiff to the benefits of the Feld-Crawford Act.

8. That plaintiff has no adequate remedy at law.

9. That the Feld-Crawford Act does not constitute an unconstitutional delegation of legislative power to private persons in violation of Section I of Article III of the Constitution of the State of New York.

10. That the Feld-Crawford Act does not deprive the defendant of liberty and property without due process of law, in violation of Section 6 of the Constitution of the State of New York and of the Fourteenth Amendment of the Constitution of the United States.

11. That the Feld-Crawford Act does not deprive defendant of the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States.

12. That the Feld-Crawford Act does not constitute an unconstitutional burden upon interstate commerce, in violation of Section 8 of Article I of the Constitution of the United States or of Article VI of the Constitution of the United States.

13. That although plaintiff is engaged in interstate commerce, and plaintiff has entered into "Fair Trade Contracts" not only in the State of New York but in other states of the United States, such contracts are immunized from the prohibitions of the Sherman Anti-Trust Act (15

U. S. C. A. 1) by the provisions of the Miller-Tydings Amendment and of the McGuire Act.

14. That the Miller-Tydings Amendment and the McGuire Act do not constitute unconstitutional delegations of legislative power to private persons, in violation of Section 8 of Article I of the Constitution of the United States.

15. That the Miller-Tydings Amendment and the McGuire Act do not deprive the defendant of liberty and property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

16. That the Miller-Tydings Amendment and the McGuire Act do not deprive the defendant of the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States.

17. That the Miller-Tydings Amendment and the McGuire Act do not constitute unconstitutional delegations of Congressional power over interstate commerce to the State of New York and other states of the United States in violation of Sections 1 and 8 of Article I of the Constitution of the United States or of Article VI of the Constitution of the United States.

18. Plaintiff is entitled to judgment permanently enjoining defendant, its officers, agents and employees, from advertising, offering for sale or selling any GE small appliances manufactured and distributed by plaintiff pursuant to the aforesaid GE Fair Trade Contracts in force in this State at prices lower than those heretofore or hereafter prescribed by plaintiff from time to time pursuant to said contracts.

19. Let judgment be entered herein accordingly.

Dated: May 7, 1953.

KENNETH O'BRIEN,
Justice of the Supreme Court of the State of New York.

Judgment

At a Special Term, Part III of the Supreme Court of the State of New York, held in and for the County of New York at the Court House thereof, Foley Square, in the Borough of Manhattan, City and State of New York, on the 8 day of May, 1953.

Present: Hon. Kenneth O'Brien, *Justice.*

[Same Title.]

This action having been instituted by the plaintiff against the defendant for an injunction and for damages and the cause having duly come on before me for trial at Special Term Part III of this Court at the New York County Court House, Borough of Manhattan, City, County and State of New York on May 7, 1953, and the parties having appeared by their respective counsel and having entered into a written stipulation of facts and due deliberation having been had thereon, and the Court having made and filed its decision dated May 7, 1953, separately stating its findings of fact and its conclusions of law, wherein the Court directed judgment as hereinafter provided

Now, on motion of White & Case, attorneys for plaintiff, it is

Ordered, adjudged and decreed:

1. That the defendant, Masters, Inc., its officers, agents, servants and employees and all other persons acting under its authority or control be and they hereby are permanently enjoined and restrained from advertising, offering for sale or selling at retail in the State of New York, electric housewares, clocks, automatic blankets, fans, heating pads, heaters and heat lamps, all as more particularly described in price sheets annexed to the complaint and subsequent revisions thereof and substitutions therefor, manufactured and sold by plaintiff and bearing plaintiff's trademark "General (GE) Electric" at prices lower than the minimum retail resale prices now established therefor by the plaintiff pursuant to agreements entered into between the plaintiff and various retail dealers in such commodities throughout the State of New York, or such minimum retail

resale prices as may hereafter be established for such commodities by the plaintiff.

Enter,
/s/ K. O'B.,
Justice of the Supreme Court of the State of New York.

/s/ ARCHIBALD R. WATSON,
Clerk.

Plaintiff's Address:
570 Lexington Avenue,
New York, N. Y.

Defendant's Address:
66 W. 48th Street,
New York, N. Y.

Filed: May 8, 1953.

Judgment of Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals held at Court of Appeals Hall in the City of Albany on the 4th day of June in the Year of Our Lord One Thousand Nine Hundred and Fifty-Four, before Judges of said Court.

Remittitur ..... June 4, 1954

Witness,

THE HON. EDMUND H. LEWIS,
Chief Judge, Presiding.

RAYMOND J. CANNON,
Clerk.

No. 76.

GENERAL ELECTRIC COMPANY,
Respondent,
vs.
MASTER, INC.,
Appellant.

BE IT REMEMBERED, That on the 11th day of March in the year of our Lord one thousand nine hundred and fifty-four, Master, Inc., the appellant—in this cause, came here unto the Court of Appeals, by Joseph F. Ruggieri, its attorney—, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And General Electric Company, the respondent—in said cause, afterwards appeared in said Court of Appeals by White & Case, its attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Leon Lauterstein, of counsel for the appellant—, and by Mr. Thomas Kiernan, of counsel

for the respondent, brief filed by amicus curiae, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

/s/ RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, June 4, 1954

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

/s/ RAYMOND J. CANNON
Clerk.

APPENDIX B

GENERAL BUSINESS LAW OF THE STATE OF NEW YORK

(McKinney's Consolidated Laws of New York)

ARTICLE XXIV-A—FAIR TRADE LAW

"§ 369-a. *Price fixing of certain commodities permitted.*

1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the state of New York by reason of any of the following provisions which may be contained in such contracts:

(a) That the buyer will not resell such commodity except at the price stipulated by the vendor;

(b) That the vendee or producer require any dealer to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

2. Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(a) In closing out the owner's stock for the purpose of discontinuing delivering any such commodity.

(b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

(c) By any officer acting under the orders of any court."

"§ 369-b. *Unfair competition defined and made actionable.*

Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of

section three hundred sixty-nine-a, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

"§ 369-c. *Exceptions.*

This article shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices."

"§ 369-d. *Definitions.*

The following terms, as used in this article, are hereby defined as follows: 'producer' means grower, baker, maker, manufacturer or publisher. 'Commodity' means any subject of commerce."

"§ 369-e. *Effect of partial invalidity.*

If any provision of this article is declared unconstitutional it is the intent of the legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect. Added L. 1940, c. 195, § 3, eff. March 19, 1940."

Section 5 of Federal Trade Commission Act, as amended, Act of July 14, 1952, Chapter 745, 66 Stat. 632 (McGuire Act), 15 U. S. C. § 45:

(a) (1) Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, are declared unlawful.

(2) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general

class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Civil

Aeronautics Act of 1938, and persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921, except as provided in section 227(b) of Title 7, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

BLEED THROUGH POOR COPY

E COPY

FILED
OCT 22 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1954

No. 381

MASTERS, INC.,
Appellant,

against

GENERAL ELECTRIC COMPANY,
Appellee.

On Appeal From the Court of Appeals in New York

MOTION TO DISMISS

THOMAS KIERNAN
EDGAR BARTON
Attorneys for Appellee
14 Wall Street
New York 5, N. Y.

Of Counsel
HOWARD AIBEL
WHITE & CASE
14 Wall Street
New York 5, N. Y.

307 BAR PRESS INC., 54 LAFAYETTE ST., NEW YORK 13 — WA. 5-3432-3.

IN THE

Supreme Court of the United States

October Term, 1954

No. 381

MASTERS, INC.,
Appellant,

against

GENERAL ELECTRIC COMPANY,
Appellee.

On Appeal From the Court of Appeals in New York

MOTION TO DISMISS

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves to dismiss on the ground that the appeal does not present a substantial federal question.

Statement

This is an appeal from the final judgment of the New York Court of Appeals entered on June 4, 1954 enjoining appellant from selling at retail, certain electrical appliances manufactured and sold by appellee and bearing its trademark, at less than the minimum retail resale prices stipulated pursuant to fair trade contracts enforced in New York State.

Appellee instituted this action on November 6, 1952 in the Supreme Court of New York County pursuant to the New York Fair Trade Act (New York General Business Law Section 369-a *et seq.*). The New York Supreme Court granted the permanent injunction sought by appellee on May 8, 1953. The judgment of the New York Supreme Court was affirmed *per curiam* by the Appellate Division of the New York Supreme Court on January 5, 1954. This judgment was subsequently affirmed by the New York Court of Appeals, 307 N. Y. 229, 120 N. E. 2d 802 (1954).

Argument

In essence, appellant's position is that the decision of this Court in 1951 in *Schwegmann* v. *Calvert Distillers Corporation*, 341 U. S. 384, requires re-examination of questions which were settled in *Old Dearborn Distributing Corp.* v. *Seagram Distillers Corp.*, 299 U. S. 183. There is no basis for this contention and we submit this Court so indicated in denying certiorari in *Schwegmann Bros.* v. *Eli Lilly & Co.*, 205 F. 2d 788 (5th Circuit 1953), cert. den. 346 U. S. 856, re-hearing denied 346 U. S. 905. While we appreciate that denial of certiorari by this Court is not to be construed as an authoritative holding, yet we submit that in denying certiorari in *Schwegmann Bros.* v. *Eli Lilly & Co.* this Court at least indicated there was no substantial federal question involved.

It was authoritatively held in *Old Dearborn* that the fair trade laws encompass no unlawful delegation to private persons of the power to fix prices in derogation of the due process clause of the Fourteenth Amendment. *Schwegmann Bros.* v. *Calvert Distillers Corp.* held merely that the Sherman Act prohibited interstate resale price maintenance so far as non-signers were concerned and that the Miller-Tydings Act was not sufficiently definitive to lift the ban of the Sherman Act against enforcement of fair trade prices insofar as non-signers were concerned.

BLEED THROUGH POOR COPY

The *Schwegmann* decision not only did not cast doubt on the *Old Dearborn* decision, but Mr. Justice Douglas' opinion in the *Schwegmann* case indicated in at least three places that further Congressional legislation was all that was needed to permit full enforcement of the fair trade laws against non-signers even though interstate commerce was involved.[1] Under these circumstances it is a misconception of the *Schwegmann* decision to state, as does appellant, that it "casts doubt on the continued vitality of the *Old Dearborn* ruling."

The argument made by appellant that the non-signer provision of the New York Fair Trade Act delegates to private persons the power to fix prices in violation of the due process clause of the Fourteenth Amendment was specifically considered and rejected by this Court in *Old Dearborn Distributing Corp.* v. *Seagram Distillers Corp.*, 299 U. S. 183. This Court stated "we find nothing in this situation to justify the contention that there is an unlawful delegation of power to private persons" (299 U. S. at p. 194). It is significant to note that with the exception of *United States* v. *Line Material Co.*, 333 U. S. 287, which is not relevant on this issue, the same cases cited on this

---

[1](1) "The fact that a state authorizes the price fixing does not, of course, give immunity to the scheme, absent approval by Congress." (341 U. S. at p. 386)

(2) "Had Congress desired to eliminate the consensual element from the arrangement and to permit blanketing a state with resale price fixing if only one retailer wanted it, we feel that different measures would have been adopted—either a nonsigner provision would have been included or resale price fixing would have been authorized without more." (341 U. S. at p. 390)

(3) "It should be remembered that it was the state laws that the federal law was designed to accommodate. Federal regulation was to give way to state regulation. When state regulation provided for resale price maintenance by both those who contracted and those who did not, and the federal regulation was relaxed only as respects 'contracts or agreements', the inference is strong that Congress left the non-contracting group to be governed by preexisting law." (341 U. S. at p. 395)

point in the present Jurisdictional Statement were cited in the briefs in the *Old Dearborn* case and distinguished by this Court.

The Jurisdictional Statement provides no support for appellant's contention that the McGuire Act raises "novel and important constitutional questions respecting limitations on the delegation of legislative power under Article I, Section 1, the Commerce clause and the Fifth Amendment of the Constitution". In fact, the provisions of the McGuire Act and the decision of this Court demonstrate there is no substantial constitutional question regarding the McGuire Act.

There is no constitutional question regarding delegation of legislative power under Article I, Section 1 of the Constitution because an examination of the McGuire Act indicates that Congress made no delegation of any of its powers. Rather, it consented to the removal of the impediment of the Sherman Act against the operation with respect to interstate commerce of resale price maintenance statutes enacted by the various states. Such Congressional consent was in specific terms, since the McGuire Act details with particularity the provisions of the state fair trade statutes to which the Congressional consent is to apply. It does so by specifying in detail the standards and safeguards which a state fair trade act must contain in order to qualify for interstate effectiveness.[2] The limited character of the Congressional consent embodied in the McGuire Act would be demonstrated if a state fair trade statute were enacted containing provisions not within the McGuire Act. Such provisions would not be within the

[2] The standards and safeguards found in each of the more than 40 fair trade state statutes include provisions that the state act must involve only trademarked and branded goods; must require the goods to be in fair and open competition with goods produced by others; must be limited to vertical rather than horizontal fair trade contracts; and must permit enforcement against non-signers only when there has been a willful and knowing disregard of the fair trade prices.

POOR COPY

Congressional consent given in the McGuire Act.[3] Thus even the most cursory examination of the McGuire Act indicates that it delegates no power vested in Congress by the Constitution. We submit that no constitutional question in this respect is raised by the mere circumstance that Congress did not apply inapplicable precedents used in exempting horizontal agreements of regulated industries from the Sherman Act to the wholly different situation involved in vertical resale price maintenance.

The terms of the McGuire Act also answer the contention that there is a violation of due process under the Fifth Amendment. The McGuire Act neither creates substantive rights nor imposes obligations. The various state fair trade statutes create the rights and impose the obligations. In the McGuire Act, Congress merely consents to the enforcement of such rights and obligations created by state fair trade acts insofar as such rights and obligations might otherwise contravene the paramount authority of the Federal antitrust laws or the Commerce clause of the Constitution.

The contention that the McGuire Act raises constitutional questions under the Commerce Clause is untenable. The decisions of this Court in *Southern Pacific Rail Co.* v. *Arizona*, 325 U. S. 761, and *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408, which hold that Congress has the undoubted power to redefine the distribution of power over interstate commerce and permit the states to regulate commerce in a manner which would otherwise not be permissible, completely dispose of this contention.

Finally, we submit, no support for review is offered by the fact that the *Old Dearborn* decision was rendered when only 14 states had adopted fair trade acts, while now at least 26 other states have adopted them, and on two occasions Congress has adopted legislation based upon the

---

[3] Compare *Masters, Inc.* v. *Sunbeam Corp.*, 112 F. Supp. 268 (S. D. N. Y. 1952) regarding a similar problem in connection with the Miller-Tydings Act.

decision of this Court in the *Old Dearborn* case. It is submitted these facts render it all the more desirable that this Court should not disturb constitutional precedents which have been established and relied upon by the legislative and executive agencies of government for almost twenty years.

Appellee respectfully submits that the appeal should be dismissed because the constitutional questions sought to be presented are so insubstantial as not to warrant further argument.

Respectfully submitted,

THOMAS KIERNAN
EDGAR BARTON
Attorneys for Appellee
14 Wall Street
New York 5, N. Y.

Of Counsel
HOWARD AIBEL
WHITE & CASE
14 Wall Street
New York 5, N. Y.

October 21, 1954.,

BLEED THROUGH POOR COPY

No. 381. MASTERS, INC. *v.* GENERAL ELECTRIC CO. Appeal from the Court of Appeals of New York. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Joseph F. Ruggieri, Thurman Arnold* and *Norman Diamond* for appellant. *Thomas Kiernan* and *Edgar Barton* for appellee. Reported below: 307 N. Y. 229, 120 N. E. 2d 802.

BLEED THROUGH POOR COPY